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12 UNITED STATES DISTRICT COURT
13 DISTRICT OF NEVADA
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15 ERIC L. BRANCH,) 3:14-cv-00423-HDM-VPC
16 Plaintiff,)
17 vs.) ORDER
18 CAROLYN W. COLVIN, Acting)
19 Commissioner of Social Security,)
20 Defendant.)
_____)

21 Before the court is the plaintiff's motion for attorney's fees
22 (#23). Defendant has opposed (#24), and plaintiff has replied
23 (#25).

24 On September 8, 2015, the court adopted and accepted the
25 report and recommendation of the United States Magistrate Judge
26 that this action be remanded to the Social Security Commissioner
27 for an award of benefits. On October 8, 2015, plaintiff moved for
28 attorney's fees pursuant to the Equal Access to Justice Act, 28

1 U.S.C. § 2412(d)(1)(A). That section provides:

2 Except as otherwise specifically provided by statute, a
3 court shall award to a prevailing party other than the
4 United States fees and other expenses, in addition to any
5 costs awarded pursuant to subsection (a), incurred by
6 that party in any civil action (other than cases sounding
7 in tort), including proceedings for judicial review of
8 agency action, brought by or against the United States in
9 any court having jurisdiction of that action, unless the
10 court finds that the position of the United States was
11 substantially justified or that special circumstances
12 make an award unjust.

13 "A position is 'substantially justified' if it has a 'reasonable
14 basis in law and fact.'" *Hardisty v. Astrue*, 592 F.3d 1072, 1079
15 (9th Cir. 2010) (quoting *Pierce v. Underwood*, 487 U.S. 552, 565
16 (1988)). Substantially justified does not mean "'justified to a
17 high degree,' but rather 'justified in substance or in the
18 main'—that is, justified to a degree that could satisfy a
19 reasonable person." *Pierce*, 487 U.S. at 565. The court considers
20 whether the defendant's position was substantially justified only
21 with respect to the issues decided by the court. See *Hardisty*, 592
22 F.3d at 1077; *Flores v. Shalala*, 49 F.3d 562, 566 (9th Cir. 1995).

23 With respect to the issue decided by this court, the
24 defendant's position was substantially justified. Whether 14,400
25 jobs nationally or 1,350 jobs in Texas were significant numbers for
26 purposes of the Step Five determination was not clearly answered by
27 binding circuit precedent. While the Ninth Circuit has described
28 as a "close call" whether 25,000 jobs nationally is sufficient, in
that same opinion it cited an Eighth Circuit case finding
sufficient as few as 10,000 jobs nationally. *Gutierrez v. Comm'r
of Soc. Sec.*, 740 F.3d 519, 529 (9th Cir. 2014). The regional
numbers were similarly close, and in making the determination as to
whether 1,350 jobs in Texas was a significant number, the court

1 relied on persuasive authority articulated in *Mericle v. Secretary*
2 *of Health & Human Servs.*, 892 F. Supp. 843, 847 (E.D. Tex. 1995)
3 and *Walker v. Shalala*, 1994 WL 171209, at *2 (S.D. Tex. 1994). The
4 court concludes that the ALJ's determination that the number was
5 significant and the defendant's decision to defend that conclusion
6 was substantially justified. The plaintiff's motion for an award
7 of attorney's fees (#23) is accordingly **DENIED**.

8 IT IS SO ORDERED.

9 DATED: This 16th day of November, 2015.

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12 UNITED STATES DISTRICT JUDGE
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